sonal estate. Cf. *Kingsbury* v. *Chapin* (Mass. 1907) 82 N. E. 700, 702. That the State's right to the tax is fixed at the instant of death, as argued in the principal case, has been repeatedly held also where decedent was testate. Assessment may be made before probate. *People* v. *Barker* (1896) 150 N. Y. 52. The assignment of a residuary legacy to an exempt legatee before administration cannot change its taxability. *Matter of Cook* (1907) 187 N. Y. 253. Where a legatee died within three days of the testator, his share was notwithstanding subject to the tax. *Matter of Borup* (1899) 28 Misc. 474. The value at the testator's death, not that at the time of transfer of actual possession, controls the appraisal of a bequest. *Matter of Davis* (1896) 149 N. Y. 539; *Matter of Sloane* (1897) 154 N. Y. 109.

This discrepancy of result may best be explained by the advance in the Court's attitude towards the scope of the statute with respect to non-residents, since the date of *Matter of James, supra,* and in failing frankly to overrule that case the Court of Appeals, it is submitted, has observed a distinction between testacy and intestacy which seems unfounded in logic or justice. That no such distinction exists appears even to have been urged in an earlier decision under the statute by one of the judges concurring in the principal case. *Matter of Romaine, supra,* 85. Later adjudications may be expected to refine the present apparent difference. Such a disposition is indicated by the terms in which *Matter of James, supra,* is in the principal case expressly affirmed. Though the reported facts give no clear warrant for such interpretation, *Matter of James* is described as holding that the tax may be avoided where a *specific* legatee of a foreign testator can obtain satisfaction of his legacy in a foreign jurisdiction. Clearly, to exact through the executor a tax on a specific legacy of designated foreign property merely because unrelated portions of the same estate lie within the taxing State, would be in effect an exercise of sovereignty beyond the jurisdiction. A distinction between intestacy and testacy broadly, is unsound; but the application of the doctrine expressed in *Matter of James, supra,* to cases of specific legacies of foreign property is both logical and just. Such limitation will bring consistency, both in legal principle and in practical administration, into the inheritance tax law of New York.

NATURE OF PRESCRIPTIVE RIGHTS AS DETERMINED BY USER.—The rule that a prescriptive right is measured by the user in which it originated, Washburn, Easements (4th Ed.) 135, cannot be rigidly applied; *Cowling* v. *Higginson* (1838) 4 M. & W. 245; it considers the use as an entity, whereas, "user" is a composite, containing different elements. Manner of using is one of these; purpose, is another. It is necessary to determine how far each of these is a substantial element of the right, for only those which are essential elements are limitations upon the right, and the right (i. e. user) is variable as to the others. For example, the acts done by virtue of, or in acquiring the right, may vary to some extent within limits comprised within the general term "manner"; it is the "manner" which must remain identical. Another question is whether the right may not be measured by the manner alone or the purpose alone, and so be varied as to the absent element. To ascertain the scope of the right in each case, it

is necessary to determine how far each of these elements constituting user, may be varied.

In *Luttrell's Case* (1601) 4 Co. Rep. 86, the change of a fulling mill to a grist mill was held not to affect the prescriptive right to a flow of water, "provided no prejudice arise" by the change. This principle that the user may be changed if no greater burden is cast on the servient estate, is the basis of many cases. *Wimbledon etc. Conservators* v. *Dixon* (1875) 1 Ch. Div. 362; *Wright & Rice* v. *Moore* (1863) 38 Ala. 593, 597; *McIntyre Bros.* v. *McGavin*, L. R. [1893] App. Cas. 268, 274. But see *Hart* v. *Chalker* (1824) 5 Conn. 311, 316; *Hulme* v. *Shreve* (1837) 4 N. J. Eq. 116. How far this principle can be used as a working rule is uncertain, either in considering possible variations in a clearly defined prescriptive right, or in considering acts done during the prescriptive period. It is wholly inapplicable to certain classes of cases. Of these, perhaps the most conspicuous are cases of "rights for all purposes." Here, a user for a variety of purposes will prove a right for all: *Cowling* v. *Higginson, supra:* the jury may infer that the right existed to the general extent claimed if the actual right exercised was for all the purposes required by the use of the premises as the need arose. The right then, in part, has no complementary user. *Dare* v. *Heathcote* (1856) 25 L. J. Ex. 245. The right includes future user; as to that, assertion of right takes the place of user. Yet ordinarily a mere claim of right without user is ineffective. *Gibson* v. *Fischer* (1885) 68 Ia. 29, 36. In such a case, the element of purpose has disappeared and the right may be varied as to that absent element. The burden may thus be increased. Again, the test of increased burden falls before the limitation found in these cases, that the dominant estate must remain substantially in the same condition: a way for agricultural purposes may not be used if the premises are changed into house lots. *Parks* v. *Bishop* (1876) 120 Mass. 340. But if, after alteration, the new purpose imposes no extra burden, the right should remain. *Sloan* v. *Holliday* (1874) 30 L. T. (N. S.) 757. Again this test fails in another class of cases, where a right of way for a special purpose, e. g., to get wood from a wood lot, is held to cease when the lot is changed. Washburn, Easements (4th Ed.) 136; semble, *Atwater* v. *Bodfish* (Mass. 1858) 11 Gray 150. In *Baldwin* v. *Boston etc. Ry. Co.* (1902) 181 Mass. 166, this is explained on the ground that "there is an actual change in the physical objects passing over the road." Surely, this is of no consequence; wood or farm products, the burden may be unchanged. This test, as an attempt to solve the extent of the permitted variation within the limits of any one of the general elements of user, is a failure. But the courts have never attempted to set up another.

Apart from the question of variation in user as governed by the essential elements of the right, the broader, fundamental question of what the user as a whole consists, must be determined. A right to drainage may be a right to maintain a drain adversely; then the right would be limited only by the capacity of the drain which would be usable for any purpose. Or the right may be only to dispose of certain sewage through the drain, and then, purpose and amount would fix the right. *Shaughnessy* v. *Leary* (1894) 162 Mass. 108. So in cases of dams. If the

capacity of the dam limits the right, there may be a wide variation in the actual amount of land flowed. The water may never be raised to the efficient height of the dam, because of waste, leaky condition, etc. Thus a serious increase of actual burden may be inflicted by subsequent repair or economical use. *Cowell* v. *Thayer* (Mass. 1843) 5 Metc. 253. These considerations have led some courts to reject this test of user and substitute the amount of land actually flowed. *Mertz* v. *Dorney* (1855) 25 Pa. 519; *Turner* v. *Hart* (1888) 71 Mich. 130; *Griffin* v. *Bartlett* (1875) 55 N. H. 119. In a recent New York case, *Bremer* v. *Manhattan Ry. Co.* (1908) 38 N. Y. Law Jour. No. 142, the court decided that the user of the plaintiff's easement of light and air was measured by the elevated structure as an entirety, and that an increase in the length and frequency of trains was immaterial. This is correct, if such user is regarded merely as a variation within the same manner of user.

An increased user for a portion of the prescriptive period will usually not affect such as has been continuous for the whole period. *Shaughnessy* v. *Leary, supra; Alcorn* v. *Sadler* (1893) 71 Miss. 634. So a gradual increase in user, though imperceptible, would be inefficient to give a right larger than the initial burden; likewise in the converse case, where there is a gradual decrease, e. g., where a dam constantly deteriorates. See *Stiles* v. *Hooker* (1827) 7 Cowen 266. Where there is a change in user, not a mere increase, the prescription will be interrupted and although some part is common to the two, no prescriptive right as to that part is gained unless it has a separate and severable existence. *Am. Bank Note Co.* v. *N. Y. etc. Ry. Co.* (1891) 129 N. Y. 252.

Power of a Corporation to Act in Chief.—The manifest inability of a purely legal entity to act *in propria persona* has led to the theory which is very uniformly laid down in the text books, that a corporation can perform no act except through an agent, Angell & Ames, Priv. Corps. (5th Ed.) § 224; 1 Spelling, Priv. Corps. §§ 174, 193, 420, the only exception being the vote of the assembled corporators. Angell & Ames, Priv. Corp. *supra.* Whether a given act is in chief or mediate becomes material where the act is required to be performed by the party in interest, or if performed through an agent, to be accompanied by different formalities. In *Bank of U. S.* v. *Danbridge* (1827) 12 Wheat. 64, it was decided that a board of directors acted as the agents of the corporation, and that their act was not that of the corporation in chief. That those acting for the corporation should be considered as, in a sense, the agents of the corporators, is comprehensible, although their powers be determined by the corporate charter, the corporators having only power to choose the persons who shall act. *Fleckner* v. *U. S. Bank* (1823) 8 Wheat. 338; *Dana* v. *Bank of the U. S.* (Pa. 1843) 5 Watts. & Serg. 223; *Burrill* v. *Nahant Bank* (Mass. 1840) 2 Met. 163; *Howland* v. *Myer* (1850) 3 N. Y. 290. But they are considered, not as the agents of the corporators, but of the corporation. *Dana* v. *Bank of the U. S., supra.* As the idea of an agent implies also a principal who is capable of controlling the agent, and as a person can do through an agent only that which he is legally capable of doing